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Brief of Kirlin for Appellee

Filed June 3, 1895.

SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF THE PETITION OF JOSEPHINE W. WUPPERMANN FOR A WRIT OF CERTIORARI IN THE CASE OF JOSEPHINE W. WUPPERMANN

Appellant

against

THE STEAMSHIP *CARIB PRINCE*, JAMES KNOTT, CLAIMANT

Appellee

BRIEF IN OPPOSITION

CONVERS & KIRLIN
Proctors for CARIB PRINCE

J. PARKER KIRLIN
Advocate

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

JOSEPHINE WUPPERMANN, *Libelant, Appellant,* AGAINST The Steamship "CARIB PRINCE," JAMES KNOTT, *Claimant, Appellee.*	No. 146.
	Brief for Appellee.
THREE OTHER CASES AGAINST THE SAME.	Nos. 147, 148, 149.

Statement.

These are appeals by the libelants from a decree dismissing the respective libels in the District Court for the Eastern District of New York.

The damage for which recovery is sought occurred on the voyage of the *Carib Prince* from Grenada to New York, in September, 1893, and amounts to $5,179.79. A rivet in the bulkhead, between the peak tank and the No. 1 hold gave way, shortly after the tank was filled at sea on the passage, and water entering the No. 1 hold through the rivet hole, damaged libelants' cargo. This rivet was on the port side

of the bulkhead, near the ship's side, and a few feet above the floor of the No. 1 hold. It was the end rivet towards midship in a series which attached a transverse strengthening brace or "knee tie" to the bulkhead on the inside of the tank. It was headed up on the hold side of the bulkhead.

The District Judge found, *upon libelants' evidence* (fols. 142–144, 133), that the rivet gave underneath and behind the head which was knocked up in a countersunk hole on the hold side of the bulkhead plating, owing to a latent defect, probably caused by too much hammering in the construction of the ship, as the rivet was cooling off, and that accordingly the loss was within an exemption against "latent defects" contained in the bill of lading. It was admitted upon the record that the exemption made a valid contract according to British law, which the Court found should govern the construction of the contract (*Opinion*, p. 166).

Facts.

1. *The testimony and charter-party.*

Libelants' counsel, in his brief, frequently cites the evidence of Engineer Keyes, Captain Legge, Chief Officer Scott, Carpenter Hopkins, &c., as though their evidence, being that of the officers and crew of the steamer, should be conclusive upon the claimant. It is important, therefore, to point out that none of the servants of the steamship, at the time this loss occurred, were the servants of the shipowner, the claimant herein, but were all servants of the charterer, Mr. George Christall (fols. 256, 439), and that Engineer Keyes and Captain Legge were *produced and examined as witnesses for the libelants* (fols. 19, 104).

It should also be pointed out that both of the log books of which libelants make frequent use were kept by the

servants of the charterer (fols. 256, 439), not by the servants of the shipowner, and are not, therefore, binding upon the ship as admissions, but only upon the charterer.

Another misleading assumption in libelants' brief is that the charter party (p. 148) has a bearing on these controversies. The libelants are not in privity with this charter-party, and in no position to claim that the express warranty of seaworthiness, contained in it, inured to their benefit. That was simply a stipulation as between George Christall, charterer, and James Knott, owner, in the agreement by which the steamship was hired to Christall for the period of four years (fols. 437, 438). Libelants, in their pleading, did not allege the charter-party, nor any part of it; they founded their action wholly upon the bills of lading, which they claimed had been issued by the steamship as a common carrier, and therefore bound her, irrespective of other engagements (fol. 5). These bills of lading (pp. 145, 147) contained no reference to the charter-party, which was introduced in evidence solely for the purpose (fol. 257) of showing that Mr. Engineer Keyes and the other members of the crew were not servants of the shipowner, and that their statements or admissions should not be taken as the statements or admissions of the claimant.

Mr. Engineer Keyes was what is known as a guaranty engineer, that is, an engineer whom the builder of the engines selects to work them during the first months of service, in order to see that they come up to the terms of the guaranty under which they are provided (fol. 415); hence the clause in the charter-party which gave the shipowner the privilege (fol. 439) of appointing engineers [selected by his engine builders]. Like the other servants of the ship, this guaranty engineer was *paid* by the charterer (fol. 439); in effect was his servant.

2. *Character and construction of the vessel.*

The *Carib Prince* was substantially a new vessel. She was built to order, for Mr. George Christall, who operates a line of steamers known as *The Trinidad Line*, from New York to Trinidad in June, 1893 (fols. 437, 20). She was an all-steel steamer of 1,304 tons net register and of 2,500 tons dead weight capacity (fol. 457). She was built by builders of the highest reputation in England, and at an expense considerably in excess of the usual cost of vessels of this class (fol. 413). She was designed to be and was an exceptionally fine vessel. Every possible care was taken in construction to insure the seaworthiness and fitness of the vessel.

The charges of unseaworthiness relate solely to the bulkhead and to the wooden flooring over the bilges. It is alleged that the rivet holes had not been opposite each other when the particular rivet in question was inserted; that a drift pin was used to "fair" the holes, and that the rivet was thereby weakened, and moreover was of poor and defective metal.

A full synopsis of the whole evidence produced by the claimant, showing the care and diligence employed in the construction of this ballast tank will be found *infra*, pages 33, 34, in the argument based upon the Harter Act. The sum of it is that the best obtainable rivets were used; that fair tests of them were made during the construction; that the riveting was done by expert men, employed solely for water-tight work; that every rivet was tested by two men with the hammer test; that the bulkhead was twice tested by water in the presence of Lloyds' surveyor, once when the steamer was above 10 feet by the stern; that the specifications for the vessel generally and for strengthening this tank exceeded the requirements of Lloyds'; that she was built in accordance with those specifications, under the personal supervision

of the shipbuilder, of the foreman riveter, of an inspector employed by the shipowner, of Lloyds' surveyor, and of the naval architect who designed the ship. The proof of due diligence in the construction of the vessel is irrefragible and uncontradicted.

3. *The drift pin charge and alleged defect in the rivet.*

Libelants called a witness of the name of Quinn, who, without any knowledge of the methods employed in shipbuilding in England, made the extraordinary statement that where a series of rivets have to be inserted in a series of holes through over-lapping plates a tapering piece of steel called a drift pin is used to bring holes which are not directly opposite each other in the plates into line by springing or stretching the plates (fol. 339). They also attempted to show that the holes in this case had not been even when the rivets were inserted, but had apparently been made so (fol. 355), although other evidence of the libelants said they had not been made so (fols. 147, 353). Quinn claimed that two holes being out of line $\frac{1}{8}$ of an inch weakened the rivet one-third (fol. 371). Saunders says the amount the holes were out of line, if anything, did not exceed $\frac{1}{16}$ of an inch, which would not affect the strength of the rivet at all (fol. 255).

Although libelants' witness, Keyes, stated that after the broken part of the rivet was driven out of the hole, it appeared to him that the holes in the different plates through which it passed were not perfectly true, he does not state the extent to which the holes were out of "fair," nor that this weakened or had anything to do with the giving way of the rivet. On the contrary, his evidence is that it broke from another cause. This rivet was at the midship end of the knee tie. The tank was of triangular shape. The heaviest pressure of the water coming against the mid-

ship part of the bulkhead possibly may have sprung it off a trifle from the knee tie on the inside of the tank, after the end rivet was gone, so that if the finger were put through the holes in the different outlapping plates, it might have felt as though the edges of the holes were not exactly true, although in point of fact they may have been true before they sprung apart.

This suggestion is borne out to some extent by the testimony of Saunders, who stated that he put his finger through the holes, in New York, before the bulkhead was repaired, and that they were then substantially fair (fols. 252–255). This evidence libelants attempt to disparage by the suggestion that the holes had been cut out by that time, but there is no evidence to that effect. The riming out, if there was any, presumably occurred at the time the new rivets were put in, and at the time Saunders saw the tank the rivets had not been put in, nor had preparations for putting them in been made (fol. 152). The holes at that time were filled by a bolt with a nut on it, which was taken off for examination (fol. 253).

The evidence of the builders leaves no room for doubt that the holes were not untrue (*infra*, pp. 33, 34). In the first place, the holes through the plates were $\frac{3}{4}$-inch holes, and the rivets put in were $\frac{3}{4}$-inch rivets. Obviously, had the holes not been true, the rivets would not have gone in. In the next place, they state that wherever holes are not perfectly true, they are made true by putting in the rimer and riming out the hole until the holes became true and a larger rivet was inserted (fols. 180, 198, 215, 230, 246, 199).

The use of the drift pin, they say, is exclusively limited to the purpose of cleaning the holes in case any dirt or rust may have accumulated in them; that is, before the rivet is put in, the drift pin, bathed in oil, is inserted in the holes (fols. 194, 193, 178, 212, 243–4).

It is self-evident that if the holes had been an eighth of an inch out of line, as suggested by Quinn and Clarke (wooden shipmaster), the use of the drift pin would not have sufficed to stretch a five-eighths of an inch cold steel plate so as to bring one hole fairly over the other. The evidence of the witness Quinn being contrary to common knowledge, in an essential particular, should be received with caution (The *Thomas Melville*, 31 Fed., 486, 487).

It is further claimed that the rivet itself was externally bad, because it appeared to have been headed up a little more on one side than on the other. This is drawing it fine. Any one who has seen hot iron riveted, will know that it is a matter of great nicety to do the hammering so as to have the head perfectly round and equally distributed on both sides of the centre of the rivet. As this rivet head went into a countersunk plate, and both sides of the head fully filling up the countersunk hole, it is obvious that the strength of the rivet was unaffected by the fact that a little more of the head was hammered up on one side than on the other.

Examined by the Court, even the witness Quinn admitted that he constantly passed rivets which were not perfectly true as good and fair work (fol. 374).

After each fresh rivet is put in, in the course of construction, the last two rivets behind it receive further hammering (fol. 143). After that, each individual rivet was twice tested with a hammer to ascertain that all is tight, and that no rivets have been broken in heading them up. After that, again, the tank was tested twice by water pressure, in the presence of the builders, a representative of the owner, and of Lloyds' surveyor, and no defect being disclosed, the tank was passed by all as sufficient and satisfactory.

Notwithstanding all these efforts, it is claimed that the

iron of the rivet in question had become crystallized by a trifle too much hammering, after it had cooled off. This appeared from the evidence of libelants' witness Keyes, who testified upon the point as follows:

Q. Are you familiar enough with qualities of iron to say whether this rivet is of good quality or not (Claimants' Exhibit 6)? A. I am, sir.

Q. Is it good or not? A. No, sir.

Q. What is its defect in your judgment? A. Inferior iron, short and brittle, without a fibre.

Q. Has that been annealed? A. Yes, sir.

Q. Might not this condition of fibre have been produced by too much hammering when it was annealing? A. Yes, sir.

Q. When a line of rivets are put in in construction they usually work on three at a time, do they not? A. Yes, sir.

Q. And every time they put in a new one they tighten the one behind it, do they not? A. They tighten the second one behind it, yes; sir.

Q. As the iron is cooling, if the second one behind is hammered too much, that will produce a crystalline character in the iron, will it not, and will give it the appearance of being short and brittle? A. Yes, sir.

Q. That is the appearance that this had? A. Yes, sir (fols. 142–144).

4. *The cause of the damage.*

The vessel left Trinidad two feet by the stern (fols. 284, 79). Three or four days out, the captain apparently thought he could make a little better speed by bringing her on a more even keel, and accordingly, he directed the peak tank, which holds 83 tons of water, to be filled. Libelants lay stress upon the fact that he said he considered it absolutely necessary for the proper trim of the vessel to fill this tank, but the context of his evidence clearly show that it was in no wise necessary for

safety, but was simply done for convenience, and in the hope of making better speed (fols. 40, 79–81).

After the damage was done, the tank was pumped out, and the vessel reached New York without further casualty, which shows that it was not "necessary" for any purpose to fill the peak tank on the passage (fol. 80).

The tank was filled up on the afternoon and night of September 3d. During the time the tank was being pumped up, the engineer's log (Apostles, p. 162) shows "ship rolling." The mate's log on the evening of September 3d shows "strong breeze," and later "fresh breeze" (p. 159). The direction of the wind was E. N. E. The course of the vessel was N. W. by N. ½ N. The wind and sea were therefore substantially abeam, and would tend to induce rolling.

There was some doubt on the evidence whether the water was discovered in the No. 1 hold on the morning following the filling of the tank, or on the second morning. Capt. Legge, called by the libelants, and testifying from recollection, said the water was found on the following morning (fol. 32); on referring to the mate's log he later agreed with the entry there made that it was found on the second morning. The carpenter, who had personal supervision of the filling of the tank and of sounding it and the No. 1 hold during the process, stated that the water was found on the morning following the filling of the tank (fols. 323, 325, 326). The District Judge found that the water was discovered in the No. 1 hold on the morning after the tank was filled (fol. 475), *and no error is assigned by libelants to this finding.*

It is customary to sound the different holds through a sounding pipe which leads to the limbers immediately forward of the bulkheads in the holds, every morning and evening. The carpenter testifies that such soundings were regularly made, and the fact further appears by the

log (fols. 321, 328 and pp. 159, 160). No water was found in the No. 1 hold when it was sounded on the evening before the accident (fols. 325, 335)—whether that be the night the tank was filled or the following night—and when sounded on the next morning, a large quantity of water was discovered (fols. 325-326, 333). The No. 1 hatches were then opened and a part of the cargo removed from the bulkhead at the point where a sound of entering water was heard, and it was discovered that a rivet head had dropped off, which was lying on a bag underneath the hole, and a stream of water was rapidly pouring in (fols. 284-286). The hole was plugged up with a wooden plug (fol. 285). The pumps were immediately started, the sluiceways in the limbers were opened, and additional holes were bored in the limber boards to allow the freer escape of the large quantity of water (fols. 326, 327, 331, 332). It was found there had been, perhaps, three feet of water in the after part of the hold, and of course something less in the forward part (fol. 283).

The sluiceways in the limbers and the valves in the direct pipes leading from the No 1 hold to the engine-room had been closed, as usual at sea, during the night, which accounted for the accumulation of water found in the morning (fols. 321, 322, 287, 288). The floor of the limbers was open enough for water to pass through (fols. 327, 332), but of course none did pass through after the limbers were full until the pumps were started and the sluices opened. The charge of unseaworthiness as to the limber boards is unsupported by any competent proof.

5. *Filling the tank at sea.*

The tank was triangular, and held 83 tons of water (fol. 258). With the rolling of the ship, it is evident that the swashing about of the water produced an enormous strain

in the acute angle of the junction of the bulkhead with the curving side of the ship. The rivet which carried away was on the port side, at the end of the knee tie or strengthening brace which led along the side of the ship and at an angle across the inside of the bulkhead. It was attached to the bulkhead by a series of rivets, of which the one that broke was at the midship end of the brace. Only one rivet head had broken, although some others were strained so as to be "weeping," that is, showing dampness (fol. 207) around them (fols. 48, 49, 114, 116, 118, 141, 150, 151, 269, 271, 284, 397), and subsequently some of those rivets were removed and renewed (fol. 254). The Court found that but one rivet had been broken (fol. 475), which was the sum of the evidence. The statement of one of libelants' witnesses, that he saw two rivets gone, relates to a time after the ship had been in port and when preparations for repairs had been made. If he saw two rivet holes at all, he doubtless saw them at the time when one of the "weeping" rivets had been knocked out after arrival in port.

No error was assigned to the finding of the District Judge that the water came through one rivet hole.

The evidence leaves no doubt that filling the tank at sea is a dangerous matter under any circumstances, and ought not to be done, except in the face of some extreme emergency, and that then the ship should be stopped. Captain Congdon, who has been surveyor to Lloyds in New York for many years, spoke from knowledge on this subject, and mentioned an instance where the bulkhead had been broken down by filling the tank at sea (fols. 397, 398, 404, 405).

Saunders, an experienced sea captain, and Martin, an engineer surveyor, also testified to the same effect (fols. 258, 415, 272).

Their evidence is not disputed. In the hand books issued

for the guidance of shipmasters, the danger of filling tanks at sea is specially dwelt upon.

Thus in *Mitcalfe's Suggestions to Mariners* (Newcastle, 1886), it is said:

"No. 29. The captain of a steamer—well loaded with grain or other perishable cargo, the disc just awash—should not be persuaded, while steaming at sea, to fill any of the ballast tanks *under the cargo*, to alter the trim and increase the speed; success is doubtful at the best, while, even if the tank is tight to commence with, the engineer will probably leave the sea cock open after the tank is full, and strain it. Certainly a claim for damage to cargo will result, and may, perhaps, be the most fortunate result of a reckless and willful act, of improper navigation.

"No. 30. It is time enough to think of filling the tanks when required to stiffen the vessel—say, after much fuel has been consumed—and, unless it is the engine-room tank, let the captain think twice before doing it, and reflect that he opens a three-inch hole in one bottom without seeing the other one or knowing where the water goes. Being in charge of many lives and a valuable cargo, he will do well to watch this risky operation from start to finish, and himself order the sea cock to be closed, or see it done, or he may find himself personally liable if damage results from neglect of this precaution.

"No. 109. Remember also that it is exceedingly dangerous to run up your ballast tanks at sea when the vessel is rolling, as there may be a difficulty in filling them, or the tank tops may be injured by the water rushing from side to side."

It is, of course, impossible for the claimant to dispute the testimony of libelants' witnesses as to the condition of the sea when the tank was filled. If, after the damage was discovered, they felt the need of covering up and extenuating their conduct, it was open to them, without

hope of contradiction, to make any entry in the log which might be sufficient for their purpose.

The logs are open to some suspicion, arising from a conflict between the statements as to when the damage was discovered, as stated therein, and as stated in the evidence of the captain and of the carpenter, speaking from recollection. The District Judge apparently discredited the logs upon this point, as he finds the damage was discovered on the morning following the filling of the tank, whereas the logs say it was the second morning. Be that as it may, it is clear from the engineer's log that the entry in the mate's log is incorrect. The mate's log says the weather was fair and fine and sea smooth; the engineer's log says the ship was "rolling" when the tank was filled, and the direction of the wind, as shown by the mate's log, supports the engineer.

Whatever the truth be as to this, it is certain that the rivet had been able to stand the tests applied by Lloyds' surveyor upon passing this tank three months before, when the ship was new (fol. 20), without disclosing any weakness in the tank, whereas filling it at sea caused the rivet to part.

As this tank is triangular in shape, and the angle at each end of the bulkhead where it joins the ship is an acute angle, it is evident that the swashing about of the water would bring an extraordinary strain upon that part of the bulkhead where the rivet broke, so that the probabilities tend to support the notion that the improper action of the officers in filling the tank at sea contributed to, if it did not cause, the breaking of the rivet head.

6. *The August hurricane.*

It appeared from the evidence that on the outward passage towards the West Indies, ten days before this cargo

was laden on board, the vessel had passed through a severe hurricane.

In connection with an argument founded upon the Harter Act, it was suggested that possibly the rivets may have become strained by the working of the vessel in that storm. The evidence of Keyes, however, showed that such was not the case; that the rivet had not been broken from strain, but from the crystalline character of the iron (fols. 142–144). Nevertheless the experience of the vessel in that storm affords the libelants a text for preaching a sermon upon the duty of minute examination of the rivets of the vessel and of the application of the hammer test to each rivet in every case after a steel steamer has passed through a storm, and for the omission to make such a test in the present case, a charge of negligence and of unseaworthiness was brought forward. Unfortunately for this argument, it appeared that a most careful examination of the particular place where this rivet was located was made by the engineer after the storm. It is true that he did not go down into the tank "for a practical examination," as the libelants point out, but after he got down there, he made it his business to make a most thorough-going examination. We quote his evidence as to this, which being libellant's own evidence, ought to conclude their theory upon this point:

Q. Did you make an examination of the interior of the tank [after the hurricane]? A. Not a practical examination. I made an examination just to satisfy myself, to have a look at the formation of the tank principally; it was the first time I had seen it; *I didn't go with the intention of examining whether there was any damage or not, but I made that my business when I was down there.*

Q. Did you examine to see whether there was any damage? A. Yes, sir.

Q. Did you look at the collision bulkhead? A. Yes, sir.

Q. Did you look at the knee tie? A. Yes, sir, wherever there were rivets.

Q. Was there any coating or wash on the forward side of the bulkhead? A. Yes, sir, a coating of Portland cement.

Q. Was that over all the rivets? A. The rivets and the bulkhead as well.

Q. Did you notice that any rivets were started on the inside? A. I couldn't tell that any had been started.

Q. Had the cement been started? A. Not that I could see.

Q. You say you examined wherever there were rivets on the inside of the tank? A. Yes, sir.

Q. How long were you down there? A. Upwards of an hour (fols. 130-131).

Q. On what day was it that you went down into this tank first after this storm? A. On the morning of the 22d of August.

Q. The vessel was then at sea? A. Yes, sir.

Q. Did anybody go with you? A. No, sir.

Q. And it was your first visit to the interior of the tank? A. Yes, sir.

Q. How did you get down into it? A. Through a manhole door.

Q. Was there a ladder to go down into it? A. Yes, sir; three ladders.

Q. Inside? A. Inside.

Q. Permanent? A. Permanent ladders.

Q. Did you carry lights with you? A. I did.

Q. In what shape? In the shape of a torch and a lantern?

Q. And you say you found it all lined with Portland cement? A. Yes, sir.

Q. How thick was that lining? A. A heavy wash—washed with a solution of cement in paste form.

Q. What would you take that to mean in thickness, a heavy wash? A. It materially differs; depends upon the surface it is put on. Put a coat of cement about one-sixteenth of an inch thick, and about the rivets would be thicker and clumsier.

Q. You found nothing to indicate any starting of the cement? A. According to appearances.

Q. Well, you saw it and you are telling us what you saw? A. Yes, sir.

Q. Was there cement on all the sides of the tank as well as the bulkhead? A. Yes, sir.

Q. And on the floor of it? A. There is no floor in it.

Q. It comes down to a flat surface on the bulkhead side, doesn't it? A. No, sir; it is wedge shaped at the bottom of the ship.

Q. Was that portion of the tank which formed the bottom of the tank also covered with cement? A. Yes, sir; not only with a wash but with a body of cement.

Q. Was the top of it, which is the underside of the between-decks there, also washed with cement? A. I am not sure of that.

Q. Could you by means of these ladders examine every portion of that interior? A. Yes, sir; and without the assistance of the ladders.

Q. Why, part of it is twenty feet high, isn't it? A. Yes; but you have got intermediate stringers that you could stand on.

Q. This particular beam to which this angle iron is attached is inside of this tank? A. Yes, sir.

Q. At what height above the bottom of the tank is that beam? A. From the ship's bottom?

Q Yes? Six feet or more.

Q. Did you look at that beam at all? A. I was on top of it.

Q. Was that also covered with cement? A. Yes, sir.

Q. Was the cement perfect there? A. Apparently (fols. 134–138.)

The notion that every rivet on a ship must be tested with a hammer after a storm is certainly novel. After such a test is applied to the rivets when first inserted, it is not supposed that any further hammer tests are necessary. Certainly, nothing in the evidence shows it is ever practiced; nor does the evidence show that it would have been

effective in the present case to discover the weakness of this particular rivet. Indeed, the evidence shows the contrary. The rivet head, which was picked up by mate Scott, showed that the break across the iron was a new break (fol. 37), and, as it broke at the bottom of the countersunk part of the head, it is evident it could not have been broken in August and still have stayed on the face of the bulkhead. Its own weight would have caused it to drop out.

The conclusion must, therefore, be that the August hurricane had nothing to do with the accident, which was really caused either by a latent defect in the material of the rivet or by the negligence of the ship's crew in filling the tank at sea, under the circumstances then existing, in the manner adopted.

POINTS.

I.

The libelants' loss, if caused by a latent defect in the rivet, was within the exception of "loss or damage from * * * accident to or latent defects in hull, tackle, boilers and machinery or their appurtenances," contained in the bill of lading.

The assignment of errors does not bring in question the finding of the District Judge that the damage was caused by a latent defect in the rivet, which did not arise through any fault of the shipowner. The fact is apparently conceded; it is only the sufficiency or legality of the exception that is brought in question on this appeal (fols. 488, 489).

But the sufficiency and the legality of the exception were both conceded by stipulation in the record, provided the Court should find English law was to be applied to its construction.

At the opening of the trial mutual admissions were made (fol. 19.) Libelants agreed:

"It is admitted that under the English law, the language of the bill of lading made a valid contract."

The District Judge found that the rights of the parties were to be expounded by English law. The bill of lading was signed and delivered in an English port, and the cause of action arose at sea, outside the limits of our jurisdiction. On familiar principles, therefore, it was a proper case for the application of English law.

Liverpool v. *Phœnix*, 129 U. S., 397.
The *Majestic*, 60 Fed., 624, 627.
Bank of Edgefield v. *Farmers' Mfg. Co.*, 2 U. S. App., 282, 295.
Fonseca v. *Cunard*, 153 Mass., 553.

No error was assigned to the conclusion that English law should be applied.

As the record stands, therefore, libelants have not in their assignment of errors laid the foundation to question the finding that the damage was caused by a latent defect in the rivet which was there through no fault of the shipowner, nor the conclusions that English law should be applied, and that by that law the exception afforded complete exemption from the loss.

The conclusion that the exception is valid and covers the loss under British law is sound, both upon principle and authority.

This exception against latent defects was obviously inserted for the purpose of exempting the ship from some liability to which, without such exception, she would be subject. It evidently was not intended to apply to mere breakages of machinery, which should occur after the voyage began, since the breaking of sound machinery

through stress of weather is treated as an inevitable accident or peril of the sea, for which the ship would not be liable, whether there were an exception or not (The *Virgo*, 3 Asp., 285; The *William Lindsay*, L. R., 5 P. C., 338).

Moreover, by its terms, this exception applies also to latent defects *in hull* and its appurtenances, showing clearly thereby its design to include latent defects existing at the time of shipment.

The exception, then, must be referable to latent defects in the hull, appurtenances and machinery existing at the time the voyage began. Of course, it does not apply to negligent defects, or to those which might have been discovered by the exercise of ordinary care, but, as to any latent defects, this exception was plainly designed to exonerate the carrier.

There are but few cases, either in this country or in England, where the direct question has been presented; but in all those similar exceptions are treated as valid and binding.

Thus, in the *Miranda*, L. R., 3 Adm. & Ecc., 561, a steam vessel became disabled at sea in consequence of her machinery breaking down. Her cargo had been shipped under bills of lading which contained "accidents from machinery" among the excepted perils. Another steamship, belonging to the same owners, fell in with the disabled vessel, towed her into port, and took proceedings against the cargo to recover salvage. The defense was that the *Miranda* was unseaworthy. The Court held, first, that there was no sufficient evidence to find that she was unseaworthy at the time the cargo was shipped, and even if there were, that the exception of "accidents from machinery" exonerated the vessel from the consequence of such breakage, and rendered the cargo liable for its proportion of salvage.

The *Laertes*, 12 Prob. Div., 187, was a similar case,

wherein the cargo was proceeded against for salvage. One set of the bills of lading under which the cargo was shipped contained, among other excepted perils, the clause: "Owners not to be liable for loss, detention, or damage * * * if arising directly or indirectly * * * from *latent defects* in boilers, machinery or any part of the vessel in which steam is used, even existing at the time of shipment, providing all reasonable means have been taken to secure efficiency." The *Laertes* broke down from a latent defect in her machinery, which could not have been discovered by the exercise of reasonable care; and it was held that the exception of latent defects, if it did not abrogate, at all events limited, the warranty which the law would otherwise imply, that the ship was seaworthy at the beginning of the voyage. The case is directly in point.

In England the *Laertes* is accepted as authority for the view that an exemption from "latent defects" simply, relieves the shipowner from damage arising from such cause.

Pollock on Bills of Lading, 39.

There is not an intimation anywhere in an English text book or case that the exception of "latent defects" does not apply to such defects existing at the time of shipment.

Notwithstanding that the bill of lading is to be expounded by English law, it is now argued on the authority of the *Caledonia*, 15 Sup. Ct. Repr., 537, 156 U. S.—that the exception cannot apply except to matters arising after the vessel has sailed in a thoroughly seaworthy condition; in effect that it applies only to latent defects arising after the ship sails. According to this view, the true reading of the sense of the exception would be "loss or damage

from latent defects arising after the ship sails are mutually excepted."

What an absurd and senseless jargon this would be. To what sort of a case could it apply? What possible liability of the shipowner, not covered by any other of the usual exceptions, could it apply to? What possible design could a sane shipowner be presumed to have in mind in inserting such a clause?

One of the familiar rules of construction in such cases is to look at the liability which would have existed without the exception, and to inquire whether the language employed is apt to relieve the shipowner from it. On this principle it is easy to see what the exemption was meant to cover. Notwithstanding the utmost diligence in construction and the most perfect freedom from negligence, the law held the owner for damage arising from latent defects. When freights were large and profitable, vessels could afford to be under such liabilities. With the introduction of exemptions the freight rates have gone down. It has often been said that the shipper receives a consideration for these exemptions in a reduced rate of freight (The *Wells City*, 61 Fed., 857; The *Persian Monarch*, 23 Fed., 820, 823). There is no liability of the owner from which a Court ought to be more willing to afford him exemption than that for latent defects, because of his freedom from fault. The bare statement that the defect is latent shows it has baffled and must baffle the extremest diligence and care. Under the German Code a latent defect is treated as *force majeur* (Section 607). That a shipowner should wish to be relieved from this extraordinary and unique liability is natural and probable. That the exception of "latent defects" was introduced in bills of lading for this purpose seems too clear for doubt. It is impossible to conceive of any other design for the insertion of this exception.

It is not denied in the *Caledonia* that apt words showing a design to limit the absoluteness of the implied warrant of seaworthiness may be inserted in a bill of lading and that the clause will then relate back to the time of shipment and modify the warranty. All that was really decided in that case on this point was that the exception of "defects" in machinery did not, in the opinion of five out of eight of the justices, show a mutual intent to limit or modify the implied warranty, by exempting the ship from the consequences of a *latent* defect. While "defects" in ordinary language include those which are latent, yet the Court construing the word against the shipowner in effect says, if he meant to exclude liability for "latent" defects (which was the *Caledonia* case), he should have said so.

This case was there referred to in argument It is noticeable that the possible meaning of a "latent defects" exemption is not alluded to in the majority opinion. Referring to the *Laertes*, the Court said:

"These exceptions were held to limit the implied warranty of seaworthiness in accordance with the expressed intention of the parties to that precise effect, and for that reason only to take the case out of the general rule."

And as if to save cases like the present from the rule of the *Caledonia* case, the Court added:

"*We are not dealing with the question of how far exceptions may be given effect in particular cases*, but whether by those under consideration claimants were exempted from liability for unseaworthiness, and we are clearly of opinion that they were not.

In the dissenting opinion of Mr. Justice BROWN, in which Mr. Justice HARLAN and Mr. Justice BREWER concurred, the decisions in this case and that of The *Curlew*, 8 U. S. App., 405, were expressly named and approved.

The ground on which the *Caledonia* was decided at Circuit played an inconspicuous part in the decision on appeal. After the case had been disposed of on other grounds the opinion said:

"Moreover, the words 'delays,' 'steam boilers and machinery or defects therein,' formed part of a long enumeration of the causes of damages, all the rest of which related to matters subsequent to the beginning of the voyage, and, by another familiar rule of construction, they should be treated as equally limited in their scope."

That principle fails of application in the present case because the exception here applies to "accidents to or latent defects in *hull*," &c.—one matter, certainly, not "subsequent to the beginning of the voyage."

With all deference, it is submitted that to apply the rule referred to in as plain a case as the present, would be to defeat the clear expressed intention of the parties by a fictitious presumption of their intention.

In conclusion, it should be pointed out that the English rule in regard to the scope and extent of these exemptions is more liberal than that alluded to in the *Caledonia*. As stated by *Carver, Carriage by Sea*, § 58, it is:

"When, however, a bill of lading has been given and taken, its provisions must be considered to relate back and apply to what has been done in regard to the shipment before it was given. It is to be taken as the expression of the contract under which everything has been done. Thus the exceptions of risks contained in it apply to the stowage of the goods, although that may have been completed before the bill of lading was given," citing

The *Duero*, L. R., 2 A. & E., 393.
Pyman v. *Burt*, 1 Cab. & E., 207.
Norman v. *Bennington*, 25 Q. B. D., 475, 478.
Nottebohn v. *Richter*, 18 Q. B. D., 63.

In the last cited case Lord Justice LINDLEY said (p. 66):

"But we must not look only at the grammatical construction; and the proper way to treat the matter is that the exceptions apply to all the risks which the shipowner takes."

In *Norman* v. *Bennington*, A. L. SMITH, *J.* (p. 477), said:

"In this bill of lading, the shipowner has exempted himself from damage to the shipper's goods, by reason of rain or of contact with other goods. This is not disputed, but the shipper contended that this exception does not apply, first, to damage done before the voyage has actually commenced. * * * As regards the first point, I do not agree with it. In my judgment, when once a shipowner has received a shipper's goods on board, and has, by his captain, given a bill of lading in the ordinary form for them, he is bound to deliver them at the port of discharge in the like good order and condition as when shipped, except he is exempted by exemptions contained in the bill of lading, and it is immaterial when the voyage in fact commenced. * * * In my judgment, the shipowner, under this bill of lading, is *prima facie* exempted from liability for damage by rain or by contact with other goods after the goods have been shipped, whether the ship had started on her voyage or not."

This accords with the principle laid down by Lord Halsbury in *Hamilton* v. *Pandorf*, 12 App. Cas., 518, 524, that it is the duty of the Court "if it is possible, to give effect to all the words that the parties have used to express what this bargain is."

It is quite plain from these cases that under English law the exception of "latent defects" would relate back to and include those existing at the time of shipment. As the scope of the exception is a matter touching its validity or

invalidity as an exemption from the damage here sued for, that point should be determined by reference to the English law; so that if our own law, under the *Caledonia* rule, would be different (which is not admitted as applied to the clause here in question) it need not be followed.

The argument based on cargo's need of an absolutely seaworthy ship in order to validate its insurance is useful in working out a rule as to whether, on principle, and in the absence of contractual exemptions a shipowner ought to be deemed to warrant against latent defects; but on the point whether for a reduced freight he shall be permitted to obtain a modification of the warranty by contract it has no bearing. For the amount saved by the reduction in the freight rate, insurance on the necessary terms no doubt would be easily procurable. Cases are rare, if there be any at all, in which an insurer has established a defense under a policy where the alleged unseaworthiness consisted in a latent defect in the vessel. Whether, since the passage of the Harter Act, which modifies the shipowner's obligation of seaworthiness by statute, the rule would still obtain that the ship must be absolutely seaworthy as against latent defects in order that a policy of insurance should attach to the risk, *quaere*.

II.

The exception of "latent defects," viewed as a qualification of the implied warranty of seaworthiness, is not unlawful as opposed to Section 2 of the Harter Act.

It is contended by the appellants that if the exception of "latent defects" modifies the warrant of seaworthiness, it is violative of Section 2 of the Harter Act (27 Stat., 445), and hence should be declared void and inoperative.

This contention, it will be observed, assumes that the clause *does* modify the absoluteness of the warrant of seaworthiness as applied to latent defects.

It is based upon some difference in the phraseology of the first, second and fourth sections from that of the third.

The first section provides that it shall not be lawful for the owner, &c., of "any vessel transporting merchandise or property *from or between ports of the United States and foreign ports*" to insert in any bill of lading, or shipping document, any clause designed to relieve the shipowner from liability for negligence "in proper loading, stowage, custody, care or proper delivery" of the merchandise. It further provides that all such clauses shall be null and void and of no effect.

Section 2 provides that it shall not be lawful for "any vessel transporting merchandise or property *from or between ports of the United States of America and foreign ports*," her owner, &c., to insert in any bill of lading or shipping document, any covenant or agreement "whereby the obligations of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo, and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided."

The third section provides more broadly "that if the owner of any vessel transporting merchandise or property *to or from any port in the United States of America*, shall exercise due diligence to make the said vessel in all respects seaworthy, &c., neither the vessel, her owner or owners, agents or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said

vessel, nor shall the vessel, her owner or owners, charterers, agents or master, be held liable for losses arising from dangers of the sea or other navigable waters," &c., nor for deviation in rendering salvage services.

Section 4 goes back again to the phraseology of sections 1 and 2. It provides that it shall be the duty of the owner or owners, master or agents "of any vessel transporting merchandise or property *from or between ports of the United States and foreign ports*, to issue to shippers of any lawful merchandise, a bill of lading" containing marks, numbers of packages, quantity, &c, stating whether it is carrier's or shipper's weight.

Section 5 provides "that for a violation of any of the provisions of this act, the owner or master of the vessel, guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding $2,000."

From the difference of phraseology employed in these sections it seems that the first, second and fourth sections would be limited in application to cases where the bill of lading is issued in this country. A violation of either of those sections entails a fine, and it is a familiar law that the penal laws of one country have no extra territorial force, and cannot affect the rights of citizens of another (*Wharton, Conflict of Laws*, Sections 4, 108, 883).

There is nothing in the statute showing an intent to make either of the acts prohibited by the first, second and fourth sections of the statute unlawful if committed abroad, or that a bill of lading, which contained provisions contrary to sections 1, 2 and 4, if lawful where made, should not be sustained and enforced in the Courts of the United States.

This view is confirmed by the phraseology of the third section, which in terms provides that if the owner of the vessel has exercised due diligence to make her seaworthy,

he shall not be liable in certain specified cases and for certain specified kinds of damage, although such losses may have been contributed to by actual unseaworthiness of the vessel (see Point IV., p. 31).

But, assuming the second section of the act applies to vessels inward bound, does it render an exception against "latent defects" invalid, viewing such exception as a qualification of the warranty of seaworthiness?

This section, as introduced by Mr. Harter, and finally passed, is shown in the subjoined parallel.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to* properly equip, man, provision, and outfit said vessel, and make said vessel seaworthy and capable of performing her intended voyage, or *any covenant or agreement* whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo, and to care for and properly deliver same shall in any wise be lessened, weakened, or avoided.	SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to exercise due diligence to* properly equip, man, provision, and outfit said vessel, and *to* make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo, and to care for and properly deliver same shall in any wise be lessened, weakened, or avoided.
[NOTE.—The parts in italics were struck out by amendment.]	[NOTE—The parts in italics were inserted by Senate amendments.]

It would seem from these changes that the design of Congress was simply to prohibit the insertion of a clause relieving a shipowner from the duty of using *due dili-*

gence to make the vessel seaworthy. In other words, "the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man, provision and outfit said vessel and to make said vessel seaworthy" are made *statutory obligations;* and it is then provided that no contract shall be lawful by which those specifically defined obligations are sought to be "lessened, weakened or avoided."

That incidentally the obligations in regard to seaworthiness, as thus defined by statute, are not quite so stringent as formerly, in that due diligence is substituted for the absolute warranty, is probably due to Senator Frye's vigilance in looking after the rights of American shipowners and to an appreciation by Congress of the inherent injustice of the former rule of seaworthiness as applied to latent defects.

In Germany the harshness of such a rule led to the introduction of a provision in the Commercial Code, § 607, that "loss and injury arising from a defective condition of the vessel, which, in spite of all possible caution, could not be discovered, are to be considered as loss and injury by the act of God." The legislation of the Harter Act is thus directly in line with the previous legislation of Germany.

In the recent case of the *Millie R. Bohannon* (64 Fed. R., 883), Judge BROWN, dealing with the scope and evident purpose of the statute, said:

"The design of the Harter Act was, I have no doubt, to relieve the carrying vessel from her previous responsibility as insurer against latent defects; and to limit her liability as respects her seaworthiness to the obligations of 'due diligence' to make the ship seaworthy."

The conclusion is that the exemption is not unlawful by our law and, therefore, is to be expounded and enforced according to English law.

III.

If the damage was caused by the negligent filling of the tank at sea, and not by a latent defect in the rivet, the loss was within the exception of "loss or damage * * * any act, neglect or default whatsoever of pilots, master or crew in the management or navigation of the ship * * * and all and every other dangers and accidents of the seas, rivers or steam navigation" which is valid by the law to be applied.

Damage caused by sea water entering the hold through the ballast tank is a loss by a danger and accident of the sea. These words in a bill of lading have the same meaning as in a policy. The only difference between the cases is that the carrier may be disentitled to the benefit of the exception if his negligence contributed to the loss (unless he has an exemption from negligence), but that will not affect the point that the loss is a loss by a danger of the seas.

The *Xantho*, 12 App. Cas., 503.
Hamilton v. *Pandorf*, 12 App. Cas., ~~503~~.
The *G. R. Booth*, 64 Fed., 878.
The *Southgate*, 1893 Prob., 329.

In *Hamilton* v. *Pandorf*, which has been repeatedly cited with apparent approval by the Supreme Court, damage to cargo by sea water entering the ship through a hole gnawed by a rat in a lead pipe was held a loss by a danger of navigation within the exception of a bill of lading. Here the sea water came through the tank.

In the present case negligence cannot disentitle the ship to the benefit of the exception, because the negligence of

the officers and crew is also specifically excepted, and it is conceded the contract is valid by English law.

The case as before argued is one for the application of English law. The fact that negligence exemptions were formerly not tolerated under our law is unimportant, since faults or errors in navigation are now excused by statute, if the owner is personally without fault and has used due diligence to make the ship seaworthy. (See Point IV.) Here he was without fault and such diligence was used in this case.

IV.

Exemption from responsibility for this loss is afforded by the 3d Section of the Harter Act.

This section (27 St. at Large, C. 105, Sec. 3, p. 445) as introduced and as it passed with amendments is shown in the subjoined parallel:

H. R. 9176 (52d Congress, 2d Sess.)	As Amended, Passed and Approved, Feb. 13, 1893.
"AN ACT RELATING TO *Contracts of Common Carriers* AND TO CERTAIN OBLIGATIONS, DUTIES AND RIGHTS IN CONNECTION WITH THE CARRIAGE OF PROPERTY.	"AN ACT *relating to Navigation of Vessels, Bills of Lading* AND TO CERTAIN OBLIGATIONS, DUTIES AND RIGHTS IN CONNECTION WITH THE CARRIAGE OF PROPERTY.
"SEC. 3. That if any vessel transporting merchandise or property *between ports* in the United States of America *and foreign ports* shall *on starting on her voyage, be* in all respects	"SEC 3. That if *the owner of* any vessel transporting merchandise or property *to or from any port* in the United States of America shall *exercise due diligence to make the said vessel* in

seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, *or master* shall become or be held responsible for damage or loss resulting from *error of judgment* in navigation or in the management of said vessel *if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery,* nor shall the owner or owners, *the vessel,* or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies, *or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such services.*"

[NOTE.—The words printed in italics were struck out by Senate amendments.]

all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent, *or charterers* shall become or be held responsible for damage or loss resulting from *faults or errors* in navigation or in the management of said vessel, nor shall the *vessel, her* owner or owners, *charterers, agent,* or master be held liable for losses arising from dangers of the sea *or other navigable waters,* acts of God, or public enemies, *or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.*"

[NOTE.—The words in italics were inserted by Senate amendments.]

This section provides as clearly as words can that if the owner of any vessel transporting merchandise *to or from* the United States shall exercise due diligence to make her seaworthy and have her properly manned, neither he nor the vessel shall be liable for losses resulting from faults or errors in the management or navigation of the vessel, or arising from dangers of the sea. Is not this loss plainly within in the statute?

1. The *Carib Prince* was transporting merchandise to the United States. She was a British vessel, it is true, but there is not a word in the statute which limits it to domestic vessels. Clearly a British vessel loading here would be subject to the penalties of the 5th section. Many of our navigation acts have often been held to apply to foreign vessels (*e. g.*, The *Strathairly*, 124 U. S., 558; The *Scotland*, 105 U. S., 24, 30; The *Etona*, 64 Fed., 880, 882). The analogy of the application of the limited liability acts is perfect.

2. Her owners had used due diligence to make her seaworthy. The only unseaworthiness charged relates to the rivet and the rivet holes, and the floors over the bilges; charges of improper construction (fols. 488, 489). Libelants' own evidence shows that when the rivet was in, the alleged defects in it and in the holes were both latent and undiscoverable (fol. 133). No amount of diligence could have availed to detect them.

The utmost diligence was used by the owners to have the vessel rightly built, and by the builders to have this particular bulkhead rightly erected and soundly riveted. The specifications for the vessel generally and for the riveting, bulkheads and water testing were elaborate and stringent (fols. 463-468), and were in excess of Lloyds' requirements (fols. 237, 240, 241). The vessel was built in accordance with them (fols. 250, 236, 184) by builders of good standing (fol. 39) at a cost considerably in excess of that of an ordinary steamer of her class (fol. 413).

The builders obtained and used the rivets most widely used in England (fol. 120). Not every one indeed, but some, were tested by bending them cold, and flattening them cold to be satisfied of their quality (fols. 171, 172). The rivet holes were spaced according to Lloyds' rules for watertight work (fol. 175), five and one-quarter inches from

centre to centre (fol. 190). Wherever the holes in the plates were not perfectly fair they were rimed out with a rimer (fols. 180, 198, 215, 230, 246), until they were fair and then a larger rivet was inserted—a $\frac{7}{8}$-inch one, instead of a $\frac{3}{4}$ one (fol. 199). The drift pin of which appellants make much ado on the ignorant supposition of Quinn, was not used in any such way nor for any such purpose as he alleged. "It is put through to clean the hole when necessary. It is put in oily waste and put through to see that the thing is perfectly clear" (fols. 194, 193, 178, 212, 243-4). The men who did the riveting in this tank were specially selected for their skill in water-tight work, some of them of thirty years' experience (fols. 186, 208, 220, 236). Their work was supervised generally by one of the builders (fol. 170); immediately by a foreman riveter of 18 years experience (fols. 184–192); by the owners' inspecting surveyor, who was at the ship about three hours a day (fols. 204–210); by a Lloyds' surveyor (fol. 220), who was there nearly every day and saw much of the riveting (fols. 224, 225), and by the owners' architect (fol. 235), who visited the ship two or three times a week (fol. 242) after the rivets were headed up. Every rivet on the bulkhead was tested with a hammer by the builders' foreman (fol. 187), and in the same way by the owners' inspector (fol. 206); and nearly every rivet was subjected to the like test by Lloyds' surveyor (fol. 221). This test would have detected any crystallization of iron in a rivet from too much hammering; but no such rivet was found (fol. 197). The bulkhead was then twice tested with the water test in presence of Lloyds' surveyor (fols 222, 187, 188, 173, 206, 207, 237). The tank was filled to about a foot above the main deck, and a pressure of 96$\frac{3}{4}$ tons exerted against the bulkhead, in excess of Lloyds' requirements (fol. 237); the vessel was then lying on an incline of $\frac{3}{8}$ of an inch to the foot

or above ten feet by the stern (fol. 206). The bulkhead showed no signs of weakness or leaking (fol. 238). After the only occasion when the tank bulkhead possibly might have been strained (in the August hurricane) the engineer went down inside the tank and examined the rivets on the bulkhead for over an hour, to see whether there had been any starting or strain; there was no evidence of any; even the cement coating on the bulkhead showed no sign of having started (fols. 130, 135-138).

On this showing, it would seem the owners had at the least used due diligence to have the bulkhead seaworthy.

Now, as to the flooring on the bilges. It is claimed the limber boards were water-tight, so that the water which entered the hold could not get out again; but this is unsupported by any evidence. The carpenter (fols. 327, 332) said the limber boards were not water tight; that when he got down to them he heard the water gurgling, and going down ; that he bored auger holes to give added facilities for the escape of large accumulations of water. The ends might have been tight on arrival in New York without the boards being water-tight all along the limbers, or anywhere along them. What kept the water in the hold was that the outlets of the limbers leading to the engine-room were closed as usual during the night (fols. 321, 322, 287, 288), and the water accumulated between the usual times of sounding the holds in the evening and morning (fols. 321, 323-326).

On the evidence there was no unseaworthiness as to the limber boards. They were right enough, and loose enough; nobody says the limbers were not full when the water was found in the hold. Anyhow, limbers are not fitted with the expectation that water is to drain through them. They are to keep cargo clear of the limbers, and are not

built with reference to unexpected incursions of the sea. They were put down by competent builders; due diligence was used by the owners to have them right; there is no proof they were not right; there is proof that they were right.

Due diligence had been used in selecting the officers and crew (fols. 414, 416).

What more could the obligations of due diligence possibly require of an owner.

3. If the Court is of opinion that filling this tank at sea, with the "ship rolling" (Engr.'s Log, Apostles, p. 162), without stopping or changing her course, was improper, and was the cause of the rivet giving way (see *ante*, pp. 10–13), such act was "a fault or error in the management or navigation of the vessel" within the meaning of the statute.

Faults or errors in navigation are not limited to neglect in shaping the ship's course. In England it has been held that leaving open a sea cock (*Good* v. *London Assn.*, L. R., 6 C. P., 563), or leaving a cargo port insufficiently fastened on sailing (*Carmichael* v. *Liverpool Assn.*, 19 Q. B. D., 242), or omitting to have the rudder pin fastened with a proper pin are matters of improper navigation and improper navigation in the ordinary sense of those words (per Lord ESHER in *Canada* v. *British Assn.*, 23 Q. B. D., 342, 343); they should have the same meaning in a bill of lading or a statute as in a policy (The *Xantho*, 12 App. Cas., 503, 513).

The vessel was in the same trim (*i. e.*, two feet by the stern) when she sailed as when the tank was filled. If that was a wrong trim it was an error or fault "in the management of the vessel" not to have filled it at Granada (23 Q. B. D., at p. 729), which probably occasioned the damage; since, if the tank had been filled there, either it

would not have given way, or, if it had, the damage would have been averted by a prompter draining off of the water.

If the damage be ascribable to any neglect on the part of those in charge of the vessel to discover its presence in the No. 1 hold more promptly, and to draw it off by opening the sluiceways and starting the pumps immediately, such negligence was plainly a fault in the management or navigation of the vessel.

4. The loss arose from a "danger of the sea" within the statute, that is from a wetting of the cargo due to an incursion of sea water.

This would plainly be a loss by a danger of the sea within a similar exception in a bill of lading (see cases cited, *ante*, Point III., p. 30, and *Transportation Co.* v. *Downer*, 11 Wall., 129, 133; *Davidson* v. *Bernaud*, L. R., 4 C. P., 119; *Lowry* v. *Douglass*, 15 M. & W., 745). The further question would then arise, under a bill of lading, whether unseaworthiness or negligence contributing to the loss, prevents the carrier from enjoying the benefit of the exception (*Liverpool* v. *Phenix*, 129 U. S., 397, 438; The *Edwin I. Morrison*, 153 U. S., 199). The test to be applied in deciding whether a given loss is a loss by a peril of the sea is to inquire whether it would have been such a loss within a policy on goods shipped upon a seaworthy ship. If so, it is such a loss within the meaning of the words "danger of the seas" wherever found (The *Xantho*, 12 App. Cas., 503). It is none the less a loss by a danger of the sea, because such losses are now exempted from a carrier's liability by statute. The words "danger of the seas" in the statute, should be construed and given precisely the same effect as when found in the form of an exception contained in a bill of lading.

The ship is not disentitled to the exemption by reason of unseaworthiness, because all this section requires is the exercise of due diligence to make the ship seaworthy, which plainly was exercised, nor by reason of negligence contributory to the loss, because the only negligence in the case, if any, relates to the way the tank was filled or the omission to remove the water more promptly, and if there was any fault about those matters it was a fault in navigation or in the management of the ship, and hence specifically exempted.

The application of this statute is not barred by the charter-party, since libelants are in no way in privity with the covenants there made between the shipowner and charterer. The bills of lading make no reference to it. So far as appears they were ignorant of its existence until put in evidence for another purpose.

The case of *New Jersey Steam Nav. Co.* v. *Mechanics' Bank*, 6 How., 378, is not authority for the point to which it is cited. It simply holds that a principal may be sued on a contract made for him in the name of his agent.

Nor is the right to claim its protection affected by the omission to refer to it by name in the answer. The exercise of due diligence was pleaded. The Court must notice and apply the statute as a part of the law of the land. Statutory exemptions are implied in all contracts, hence are not required to be specifically pleaded, like statutes which simply affect the remedy.

Carver Carriage by Sea, Sec. 76.

Backsondale v. *Great Eastern Ry.*, L. R., 4 Q. B., 244, 255.

The conclusion is that exemption from responsibility for libelants' loss is afforded by the statute, and that the ship-

owner performed the conditions which make it applicable and enforceable.

VI.

The decrees appealed from should be affirmed, with costs.

APRIL, 1895.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for *Carib Prince*, Appellee.

J. PARKER KIRLIN,
Advocate.